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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1346

JOHN L. McLUCAS, Secretary of the Air Force, *et al.*,

Appellants,

v.

RAYMOND G. DeCHAMPLAIN,

Appellee.

MOTION TO DISMISS

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The instant appeal arises in the following context. The district court enjoined the enforcement of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, an Act of Congress, and further enjoined appellee's court-martial on any and all charges until his civilian defense counsel is granted full access to relevant evidence and documents. The government appealed directly to this Court pursuant to 28 U.S.C. § 1252, alleging jurisdiction because the district court had held an Act of Congress to be unconstitutional.

Appellee submits that Article 134 is so clearly unconstitutional that the appeal should be dismissed for failure to raise a substantial federal question. In the alternative, however, should the Court find that there does exist a substantial question as to the constitutionality of Article 134, it must find that it lacks jurisdiction over the instant appeal.

The government's right to take a direct appeal to this Court pursuant to 28 U.S.C. § 1252 rests solely on the district court's action in holding Article 134 unconstitutional. While if the Court finds it has jurisdiction on the appealable issue, it may decide all other issues in the case, *United States* v. *Raines*, 362 U.S. 17, 27 n. 7 (1960), jurisdiction over those other issues is pendent to jurisdiction over the appealable issue. Thus, if the Court finds that it lacks jurisdiction on the Article 134 question, or if the question is not substantial, jurisdiction over the entire appeal must fall.

POINT I

The Appeal Fails to Raise a Substantial Question With Respect to the Constitutionality of an Act of Congress.

The district court did not fashion its own holding that Article 134 is unconstitutional; it merely followed the prior decisions of the Court of Appeals for the District of Columbia to that effect. *Avrech* v. *Secretary of the Navy*, 477 F.2d 1237 (D.C. Cir. 1973); *Hooper* v. *Laird*, 482 F.2d 784 (D.C. Cir. 1973). *Accord*, *Levy* v. *Parker*, 478 F.2d 772 (3d. Cir. 1973). See Jurisdictional Statement (J.S.) at 20. This, of course, the district court was required to do.

The present appeal must be viewed in its proper context. The question of the constitutionality of Article 134 was argued before the Court on February 20th. *Secretary of the Navy* v. *Avrech*, No. 72-1713; *Parker* v. *Levy*, No. 73-206. That question presumably will be decided this term, well before the merits of the instant case can be reached. If the decisions in *Avrech* and *Levy* are affirmed, the district court's decision here will have been correct, and no substantial federal question will remain. If *Avrech* and *Levy* are reversed, the district court's decision here with respect to Article 134 should be vacated summarily; again, no substantial federal question warranting this Court's plenary review on direct appeal would exist. Thus, in either event, the instant appeal pursuant to 28 U.S.C. § 1252 must be dismissed.

The government seeks to avoid this result by urging that appellee in the instant case was charged with a violation of the third clause of Article 134, while *Avrech* and *Levy* were charged with violations of clauses one and two. J.S. at 10-11. The government's argument assumes that Article 134 is readily divisible into three neat, distinct statutes, and that therefore *Avrech* and *Levy* do not govern the outcome here. This simply is not the case. The charge against appellee here does not allege a violation of "Article 134, clause 3," but rather alleges "Violation of the Uniform Code of Military Justice, Article 134." While the specifications of the charges allege violations of particular federal statutes, that does not limit appellee's vulnerability to conviction to proof of violation of those specific statutes. Indeed it is clear that appellee may be convicted pursuant to clause one or two of Article 134 even if proof is insufficient to convict under the civilian federal statutes specified. The question was raised and answered, based upon a full analysis of the cases, in Moyer, *Justice and the Military*, § 5-163, p. 1004 (PLEI 1972):

> "May a conviction [for violation of a federal criminal statute] be sustained when, for example, there is a failure of proof of one element or when the conduct on which a prosecution is based clearly lacks one of the elements of the civilian crime?
>
> "Under military case law, such a failing does not preclude a conviction provided the conduct is prejudicial to good order and discipline or is service discrediting. Even if all the elements of the civilian

offense cannot be proved, a serviceman may be convicted under clause 1 or 2. Accordingly, a clause 1 or 2 offense may be based generally on a civilian offense without being bound to its elements."

Thus, in *United States* v. *Long*, 2 USCMA 60, 6 CMR 60 (1952), the accused was charged with violating Article 134 for assaulting a government witness. The specification alleged a violation of 18 U.S.C. § 241 (now 1503). The Court of Military Appeals rejected the accused's argument that the government must prove a violation of the federal statute cited in the specification, ruling that the reference to that statute was mere surplusage, that the charge alleged a violation of Article 134, and affirming the conviction under clauses 1 and 2.

Similarly, in *United States* v. *Blevens*, 5 USCMA 480, 18 CMR 104 (1955), the accused was charged under Article 134 for allegedly violating the Smith Act. The case was tried as a violation of that Act, and the law officer instructed the court-martial according to it. The Court of Military Appeals affirmed the conviction under the "service discrediting" clause of Article 134.

See also *United States* v. *White*, 7 CMR 764 (AFBR 1953), in which convictions under two specifications alleging offenses under 18 U.S.C. § 281 (now § 203(a)) were affirmed under clause 2; *United States* v. *Harvey*, 19 USCMA 539, 42 CMR 141 (1970), where the Court of Military Appeals affirmed a clause 1 offense as a lesser included offense of a clause 3 charge; *United States* v. *Perkins*, 47 CMR 259 (AFBR 1973), where the Air Force Court of Military Review indicated that an Article 134 charge specifying violation of the espionage acts of the United States could result in a conviction under the first two clauses of Article 134.

Thus, where, as here, the military charges a violation of Article 134, specifying a violation of a federal criminal statute, the accused nevertheless is put in serious jeopardy of conviction pursuant to the first two clauses of that Article. Consequently, the vices of vague penal statutes which were the basis of constitutional attacks in *Avrech* and *Levy* are equally applicable to the instant case. The Court's decisions in *Avrech* and *Levy* will dispose of the constitutional issue here.

POINT II

If the Appeal Does Raise a Substantial Constitutional Question With Respect to Article 134, then this Court Does Not Have Jurisdiction of the Appeal.

If this Court should determine that a substantial question of constitutional law does remain with respect to Article 134, then the Court nevertheless lacks jurisdiction over the appeal. For in that case, the district court judge, acting alone, lacked jurisdiction to enter an order restraining the enforcement of Article 134. Rather, he was required to convene a three-judge court to hear and decide that issue. 28 U.S.C. § 2282; *Idlewild Bon Voyage Liquor Corp* v. *Epstein*, 370 U.S. 713 (1962). And it has long been the rule that this Court may not review injunctions entered by a single district judge that required the consideration of a three-judge court:

> "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three

> judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court." *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U.S. 10, 15-16 (1930). See also *Hicks* v. *Pleasure House, Inc.*, 404 U.S. 1, 3 (1971).

The *Stratton* Court suggested that no appeal would lie to the Courts of Appeals from such injunctions erroneously entered by a single district judge. An aggrieved party, however, was not left without a remedy to vacate the order:

> "Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction. . . . *This remedy would not be available if there were a remedy by appeal. . . .*" *Id.* at 16 (emphasis added).

More recently, the Court drew back from its suggestion in *Stratton* that no relief could be sought in the Courts of Appeals. In *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, *supra*, it held that an aggrieved party could seek relief in the Court of Appeals from the failure of a district judge to convene a three-judge court. The Court of Appeals could not review the merits of the single judge's decision, over which it still lacked jurisdiction under the *Stratton* doctrine, but it could give "guidance" to the district court as to whether a three-judge court was required. Subsequent decisions of this Court made plain that such "guidance" was as binding upon the district courts as are other decisions of the Courts of Appeals. *Hicks* v. *Pleasure House, Inc.*, *supra*; *Schackman* v. *Arnebergh*, 387 U.S. 427 (1967); *Buchanan* v. *Rhodes*, 385 U.S. 3 (1966). Consequently, those cases held that the extraordinary remedy of mandamus to the Supreme Court, available after *Stratton*, was no longer necessary and thus could not be had. The party aggrieved by the district judge's action must seek relief in the Court of Appeals and not in the Supreme Court. See *Hicks*, *Schackman*, *Buchanan*, *supra*; Wright, *Law of Federal Courts* (2d Ed. 1970), §50, p. 193.

Accordingly, if the Article 134 question raised in this case is at all substantial, the instant appeal must be dismised. Appellant's relief lies only through an appeal to the Court of Appeals for the District of Columbia Circuit.

It should be noted, however, that the district court judge need not nor should not have convened a three-judge court to consider the entirely separate claims of access to documents and conduct of the trial. These claims had absolutely no relevance to the claim that Article 134 was unconstitutional. While a single judge should remit to a three-judge court determination of all the issues, constitutional and non-constitutional, concerning the validity of the *statute* challenged, *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960),[1] a single judge should

1. Even then, the preferred procedure is for the single judge to decide the non-constitutional issues relating to the statute's interpretation and application, either before or after consideration of the constitutional issue by the three-judge court. *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970); *Norton* v. *Richardson*, 352 F.Supp. 596, 599 (D.Md. 1972); *Doe* v. *Lavine*, 347 F.Supp. 357 (SDNY 1972); *Doe* v.

(Footnote continued on next page)

himself decide independent joined claims not relating to the validity or interpretation of that statute.[2] Indeed, the three-judge court probably would lack jurisdiction to decide such independent claims.[3]

In any event, the single judge in the instant case certainly had jurisdiction to decide the independent federal questions raised other than the constitutionality of Article 134. The district court's determination of those issues, however, is not appealable directly to this Court pursuant to 28 USC § 1252, because it did not involve the constitutionality of an Act of Congress. Thus, the Court may not decide those issues at this time *unless* it notes jurisdiction over the Article 134 question. *United States* v. *Raines, supra.* Appellant must seek review in the normal manner in the Court of Appeals.

(Footnote continued from previous page)

Gillman, 347 F.Supp. 482, 483 (N.D.Iowa 1972); *Hubert* v. *Saucier*, 347 F.Supp. 152 (N.D.Ga. 1972); *Linnane* v. *Betit*, 331 F.Supp. 868 (D. Vermont 1971); *Saddler* v. *Winstead*, 327 F.Supp. 568 (N.D. Miss. 1971); *Woolfolk* v. *Brown*, 325 F.Supp. 1162 (E.D.Va. 1971); *Doe* v. *Hursh*, 337 F.Supp. 614, 616 (D.Minn. 1970); *Bryant* v. *Carleson*, 444 F.2d 353 (9th Cir. 1971), *cert. den.* 404 U.S. 967 (1971); *Chicago, Duluth, Georgian Bay Transit Co.* v. *Nims*, 252 F.2d 317 (6th Cir. 1958).

2. *Landry* v. *Daley*, 280 F.Supp. 929, 937-938 (N.D.Ill. 1967), 288 F.Supp. 194, 197-199 (N.D.Ill. 1968); *Hobson* v. *Hansen*, 256 F.Supp. 18 (D.D.C. 1956); *Jehovah's Witnesses in State of Wash.* v. *King County Hosp.*, 278 F.Supp. 488, 496-497 n.6 (W.D.Wash. 1967), *aff'd* 390 U.S. 598 (1968); *ABC Books, Inc.* v. *Benson*, 315 F.Supp. 695, 703 (M.D.Tenn. 1970); *Ascheim* v. *Quinlan*, 314 F.Supp. 685 (M.D.Pa. 1970); *Tillman* v. *Dade County School Board*, 327 F.Supp. 927, 930 (S.D.Fla. 1971); Wright, *Law of Federal Courts, supra* at 191.

3. See *Pittsburgh & W.V.Ry. Co.* v. *United States*, 281 U.S. 479, 488 (1930); *New York Central Sec. Corp.* v. *United States*, 287 U.S. 12 (1932); *Powell* v. *United States*, 300 U.S. 276, 289-290 (1937); Wright, *Law of Federal Courts, supra* at 191.

CONCLUSION

The Appeal Should be Dismissed.

Respectfully submitted,

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